Supreme Court, U.S.
FILED

No. 94-1739 APR 24 1995

OFFICE OF THE CLERK

Supreme Court of the United States

OCTOBER TERM, 1994

NATIONAL PAINT & COATINGS ASSOCIATION; RUST-OLEUM CORPORATION, an Illinois corporation; THE SHERWIN-WILLIAMS COMPANY, an Ohio corporation; ACE HARDWARE CORPORATION, a Delaware corporation; TRU-TEST MANUFACTURING COMPANY, a Delaware corporation; FMA, INC., d/b/a JIM'S ACE HARDWARE, an Illinois corporation; W.C. SCHAUER HARDWARE CENTER, INC., an Illinois corporation; and SMILEY ACE HARDWARE, INC., an Illinois corporation,

Petitioners,

v.

CITY OF CHICAGO, an Illinois municipal corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

STEVEN P. HANDLER
Counsel of Record
BRUCE H. WEITZMAN
DANIEL J. DONNELLY
McDERMOTT, WILL & EMERY
227 West Monroe Street
Chicago, Illinois 60606
(312) 372-2000

Attorneys for All Petitioners except The Sherwin-Williams Company

THOMAS G. DENT
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
55 East Monroe Street
Chicago, Illinois 60603
(312) 346-8000

Attorneys for The Sherwin-Williams Company

Of Counsel:

HEIDI K. McAULIFFE
NATIONAL PAINT & COATINGS ASSOCIATION
1500 Rhode Island Avenue, N.W.
Washington, D.C. 20005
(202) 462-6272

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

86 pp

QUESTIONS PRESENTED FOR REVIEW

1) Does the Commerce Clause test outlined in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), and subsequent Supreme Court cases apply to ordinances that regulate evenhandedly, i.e., do not discriminate against interstate commerce?

2) In applying the *Pike* test, can the district court hold an evidentiary hearing as to whether the burden imposed on interstate commerce by a local ordinance is clearly excessive in relation to the putative local goal and as to whether the stated goal can be promoted with a lesser impact on interstate commerce?

LIST OF PARTIES

All parties are set forth in the caption. A Rule 29.1 list of corporate petitioners was filed on February 24, 1995 in connection with the Petitioners' Application for a Stay.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW ..	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
A. The District Court Relied Upon the *Pike* Test in Holding the Sales Ban Ordinance Unconstitutional	3
B. The Sales Ban Ordinance Would Affect Millions of Dollars in Interstate Commerce, Because Most Spray Paint is Manufactured Outside of Illinois	4
C. Most Graffiti is a Planned Activity Committed by Highly Motivated Teenagers Who Would Not Be Deterred by the Sales Ban	5
D. The Ordinance Would Not Lessen Graffiti, Because These Highly Motivated Graffiti Vandals Have Numerous Alternative Sources for Spray Paint and Other Graffiti Tools	7

E. Less Restrictive Alternatives Exist to Deter Graffiti 8

F. Although the City Agreed the Case was Subject to the *Pike* Test, the Seventh Circuit Held that *Pike* was Inapplicable to the Present Case 9

REASONS FOR GRANTING THE WRIT 11

I. The Decision Below Is in Direct Conflict with Decisions of This Court and Other Courts of Appeals as to the Standard for Review in Commerce Clause Cases ... 12

II. The Decision Below Is in Direct Conflict with Decisions of This Court and Other Courts of Appeals as to Whether the District Court Can Conduct an Evidentiary Hearing under *Pike* 21

CONCLUSION 26

APPENDICES ..... App. 1

TABLE OF AUTHORITIES

Federal Cases	PAGE
Barber v. State of Hawaii, 42 F.3d 1185 (9th Cir. 1994)	19
Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888 (1988)	13
Blue Circle Cement, Inc. v. Board of County Commissioners of the County of Rogers, 27 F.3d 1499 (10th Cir. 1994)	19, 24, 25
C&A Carbone, Inc. v. Town of Clarkston, New York, 114 S. Ct. 1677 (1994)	17, 18
Cooper v. McBeath, 11 F.3d 547 (5th Cir. 1994)	19
CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987)	13
Diamond Waste, Inc. v. Monroe County, Ga., 939 F.2d 941 (11th Cir. 1991)	19
Fireside Nissan, Inc. v. Fanning, 30 F.3d 206 (1st Cir. 1994)	18, 19
Instructional Systems, Inc. v. Computer Curriculum Corp., 35 F.3d 813 (3rd Cir. 1994)	14
Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981)	23
Medigen of Kentucky, Inc. v. Public Service Commission of West Virginia, 985 F.2d 164 (4th Cir. 1993)	19
Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981)	15, 16, 23, 24
National Paint & Coatings Ass'n v. City of Chicago, 45 F.3d 1124 (7th Cir. 1995)	1
National Paint & Coatings Ass'n v. City of Chicago, 835 F. Supp. 421 (N.D. Ill. 1993)	1

New York State Trawlers Ass'n v. Jorling, 16 F.3d 1303 (2d Cir. 1994) 19

Oregon Waste Systems, Inc. v. Department of Environmental Quality of the State of Oregon, 114 S. Ct. 1345 (1994) 16, 17

Philadelphia v. New Jersey, 437 U.S. 617 (1978) . 11, 15

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) .. *passim*

Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978) 22, 23

Sherwin-Williams Co. v. City and County of San Francisco, 857 F. Supp. 1355 (N.D. Cal. 1994) 19, 20, 25

SDDS, Inc. v. State of South Dakota, 47 F.3d 263 (8th Cir. 1995) 19

Constitutional and Statutory Provisions

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 3

Commerce Clause, U.S. Const. art. I, § 8, cl. 3 .. 1

Municipal Code of Chicago, Illinois § 4-132-150 (1992) 1, 3

Miscellaneous

Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091 (1986) 12

Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 Yale L.J. 425 (1982) 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

NATIONAL PAINT & COATINGS ASSOCIATION; RUST-OLEUM CORPORATION, an Illinois corporation; THE SHERWIN-WILLIAMS COMPANY, an Ohio corporation; ACE HARDWARE CORPORATION, a Delaware corporation; TRU-TEST MANUFACTURING COMPANY, a Delaware corporation; FMA, INC., d/b/a JIM'S ACE HARDWARE, an Illinois corporation; W.C. SCHAUER HARDWARE CENTER, INC., an Illinois corporation; and SMILEY ACE HARDWARE, INC., an Illinois corporation,

Petitioners,

v.

CITY OF CHICAGO, an Illinois municipal corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The September 29, 1993 Memorandum Opinion and Order ("District Court Order") of the United States District Court for the Northern District of Illinois enjoining enforcement of § 4-132-150 of the Municipal Code of Chicago (sales ban ordinance) as a violation of the Commerce Clause is reported at 835 F. Supp. 421 (N.D. Ill. 1993) (App. 2, p. 20). The January 24, 1995 Opinion and Order of the United States Court of Appeals for the Seventh Circuit reversing the District Court Order is reported at 45 F.3d 1124 (7th Cir. 1995) (App. 1, p. 1).

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on January 24, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1) The Commerce Clause, U.S. Const. art. I, § 8, cl. 3:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes.

2) Municipal Code of Chicago, Illinois § 4-132-150 (1992):

> It shall be unlawful for any person holding a retail business license to sell paint in spray cans to any person or to sell any marker containing a fluid which is not water soluble and has a point, brush, applicator or other writing surface of three-eighths of an inch or greater to any person.

STATEMENT OF THE CASE

The Seventh Circuit decision in this case represents a departure from twenty-five years of Supreme Court precedent and alters the analytical framework of dormant Commerce Clause analysis. As a result, legitimate household products and millions of dollars of interstate commerce may not be entitled to Commerce Clause protection traditionally afforded by this Court and other circuits.

This case involves a Chicago ordinance that banned the retail sale of spray paint and large markers in the City as a supposed anti-graffiti measure. The district court held the ordinance unconstitutional under the dormant Commerce Clause test enunciated by this Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). In doing so, the district court found after a trial that: (1) the sales ban would have a substantial impact on interstate commerce; (2) the ordinance would not lessen graffiti in Chicago; and (3) less restrictive alternatives existed for combatting graffiti. The City did not contest these factual findings on appeal.

Nevertheless, departing from *Pike* and twenty-five years of precedent from this Court and several courts of appeals, the Seventh Circuit reversed the district court's decision and held the ordinance constitutional. In so ruling, the court below fundamentally changed dormant commerce clause analysis by replacing the virtual per se standard of invalidity for ordinances that discriminate in effect against interstate commerce with the less stringent *Pike* test that was formerly reserved, by its express terms, for review of nondiscriminatory ordinances. For those nondiscriminatory ordinances no longer subject to review under *Pike*, the Seventh Circuit imposed mere

rational-basis review. The effect of the Seventh Circuit's decision in this case, and recent decisions of the Third Circuit, is to give states and municipalities greater latitude in restricting millions of dollars of interstate commerce.

The petitioners seek certiorari in order to resolve the conflict in the law over the proper standards governing Commerce Clause cases. A more detailed statement of the case follows:

A. The District Court Relied Upon the *Pike* Test in Holding the Sales Ban Ordinance Unconstitutional.

On May 20, 1992, the City of Chicago passed municipal ordinance § 4-132-150 which barred the retail sale of spray paint and certain large markers. The petitioners, consisting of a national paint industry association and individual spray paint manufacturers, wholesalers, and retailers,[1] filed suit in the United States District Court for the Northern District of Illinois challenging the constitutionality of the ordinance as a violation of the Commerce Clause.[2] Jurisdiction was asserted pursuant to 28 U.S.C. § 1331. On June 23, 1992, the district court entered an order enjoining the enforcement of the order while the litigation proceeded, and the City voluntarily agreed not to seek review of that order.

---

[1] The petitioners are the National Paint & Coatings Association; Rust-Oleum Corporation; The Sherwin-Williams Company; Ace Hardware Corporation; Tru-Test Manufacturing Company; FMA, Inc. d/b/a Jim's Ace Hardware; W.C. Schauer Hardware Center, Inc.; and Smiley Ace Hardware, Inc.

[2] The petitioners raised additional constitutional challenges to the ordinance, none of which are material for purposes of this petition.

After extensive discovery, the district court held a six-day trial. On September 29, 1993, that court entered an order declaring the sales ban unconstitutional. (App. 2, pp. 46-48). In doing so, the court reviewed the ordinance under the balancing test first enunciated by this Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). According to the plain language of that decision, the *Pike* test applied to statutes and ordinances that impacted interstate commerce, but did not discriminate against such commerce:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it can be promoted as well with a lesser impact on interstate activities.

Id. at 142.

Under this test, the district court held the ordinance unconstitutional, because: (1) the sales ban would have a substantial impact on interstate commerce; (2) the ordinance would not lessen graffiti in Chicago; and (3) less restrictive alternatives existed for combatting graffiti. (App. 2, pp. 46-48).

B. The Sales Ban Ordinance Would Affect Millions of Dollars in Interstate Commerce, Because Most Spray Paint is Manufactured Outside of Illinois.

Relying substantially on uncontroverted evidence, the district court determined that the spray paint sales ban

would impose significant burdens on interstate commerce. (App. 2, p. 42). Spray paint is sold in interstate commerce throughout the country, and approximately 99% of spray paint is used for legitimate purposes by hundreds of thousands of people in Chicago and by millions of people nationwide. The legitimate uses include: painting furniture, railings, radiators, barbecue grills, lawn and garden equipment, fences, toys, and other intricately shaped items; painting smooth surfaces to avoid brush marks; touch-ups on cars, appliances, cabinets, etc.; small painting jobs that do not warrant a full container of paint and brushes; art and theater uses; safety and hazard markings; and many other activities by homeowners preserving and improving their property. (App. 2, pp. 39-40).

Most spray paint sold in Chicago is manufactured outside of Illinois. (App. 2, p. 40). Testimony from experts for both the plaintiffs and the City showed that the sales ban would cause manufacturers outside of Illinois to lose tens of millions of dollars of sales as a result of the sales ban. (App. 2, pp. 40-41). Manufacturers outside of Illinois would also be forced to cut capital investment and employment. (App. 2, p. 41).

C. Most Graffiti is a Planned Activity Committed by Highly Motivated Teenagers Who Would Not Be Deterred by the Sales Ban.

As the district court found, graffiti is generally not a random act of vandalism. Instead, the vast majority of graffiti vandalism in Chicago is committed by highly motivated individuals, either taggers or gang members, who carefully plan their graffiti vandalism. (App. 2, pp. 26-27).

The term "taggers" is derived from the "tags" which are the stylized signatures of the graffiti writers' self-chosen nicknames. Taggers are overwhelmingly male teenagers. (App. 2, p. 28). They are highly mobile, "children of the transit system." (App. 2, p. 29). They travel throughout the city and suburbs by automobile, public transportation, and foot to obtain materials and write graffiti. (App. 2, p. 29). Taggers are intensely committed and, in some instances, are addicted to tagging, often running significant risks of physical injury in the process. (App. 2, pp. 29-30).

Achieving fame is a significant driving force, as taggers compete to obtain status among their peers. (App. 2, p. 29). Achieving fame necessitates a high degree of planning, energy and commitment; in their "hip-hop" culture, graffiti is not random or spontaneous. (App. 2, p. 29). Geographic dispersion is important to taggers, prompting those who live in Chicago to travel throughout the city and to the suburbs. (App. 2, p. 29). The most valued graffiti is that which carries the greatest risk of physical harm to the tagger, such as graffiti written on the third rail of the subway or at the top of a freeway sign. (App. 2, pp. 29-30).

A tagger typically obtains a sense of individual power by controlling various surfaces with his name or "tag"; taggers experience a collective power by being part of a movement or culture. (App. 2, p. 30). Taggers also value rebellion, *i.e.*, the chance to disobey conventional norms; many thrive on the push-and-pull with authorities inherent in graffiti writing. (App. 2, p. 30).

Distinct from tagger graffiti is the graffiti created by gang members. (App. 2, p. 30). Gangs use graffiti to mark territory and eulogize their dead, as an important

part of gang culture. (App. 2, p. 30). Gangs are not limited to the city's boundaries; they extend into the suburbs as well. Gang members are highly mobile; even members under the age of 16 drive or have access to cars. Within gang culture, far from being a random or unplanned activity, younger members are instructed on where and when to apply graffiti. (App. 2, p. 30). Gang leaders oversee the placing of graffiti to ensure that unwanted attention is not brought upon the gang. (App. 2, p. 30). The amount of graffiti created by gangs has been dwarfed by the amounts created by taggers and continues to diminish.

D. The Ordinance Would Not Lessen Graffiti, Because These Highly Motivated Graffiti Vandals Have Numerous Alternative Sources for Spray Paint and Other Graffiti Tools.

The evidence adduced at trial revealed that graffiti would not be diminished by the sales ban. Materials are available to vandals from many sources other than Chicago retail stores. For non-resident vandals creating graffiti in Chicago, spray paint and large markers are easily available near their homes in the suburbs. (App. 2, p. 35). For vandals who reside in Chicago, there is easy access, via both public and private transportation, to the suburbs where there are literally hundreds of outlets selling spray paint and large markers. (App. 2, p. 35). As to many of the structures hit by graffiti, transportation time to the suburbs is less than ten minutes. (App. 2, p. 35). Even if only a small number of graffiti vandals or their suppliers traveled to the suburbs, they would likely bring back enough spray paint and large markers to supply other vandals. (App. 2, pp. 35-36).

Within Chicago, a large underground market for spray paint and large markers already exists. (App. 2, pp. 35-36). For example, one black market supplier alone was responsible for up to 80% of the supply used by vandals on Chicago Transit Authority property. (App. 2, p. 36). Moreover, the effect of banning spray paint and large markers would be an increase in other, more destructive, forms of graffiti, such as etching. (App. 2, p. 37).

After considering the evidence as to who creates graffiti, why, and with what, the district court concluded that "the challenged ordinances will sadly have no deterrent effect whatsoever." (App. 2, p. 26). The City did not challenge this finding on appeal.

E. Less Restrictive Alternatives Exist to Deter Graffiti.

As to alternatives, the district court found that the City had not pursued viable alternatives to deal with graffiti that would have had a lesser impact on interstate commerce than a complete ban. For those anti-graffiti programs in existence before May, 1992, the City's funding had *declined* in years prior to the passage of the sales ban. (App. 2, p. 43). The anti-graffiti education programs at City agencies were sparse at best. Neither Chicago's Board of Education nor the Chicago Housing Authority had anti-graffiti programs. Thus, while no easy solution to graffiti exists, other alternatives were left unexplored or abandoned before the adoption of the sales ban. (App. 2, p. 44).

On the other hand, where resources were devoted to anti-graffiti efforts, both in Chicago and elsewhere, success has been achieved in arresting or reducing graffiti. For example, combining vigorous law enforcement and

prompt removal of graffiti in transit systems in both Chicago and New York has significantly impacted graffiti in those systems. (App. 2, p. 44). An additional component that has been effective in Chicago and elsewhere consists of wall-mural contests and other such programs involving "permission walls." (App. 2, p. 44). When compared with the ordinance's significant burden on interstate commerce, the non-existent benefits of the ordinance combined with the existence of viable but unexplored alternatives dictated that the ordinance violated the Commerce Clause. (App. 2, pp. 46-48).

F. Although the City Agreed the Case was Subject to the *Pike* Test, the Seventh Circuit Held that *Pike* was Inapplicable to the Present Case.

On appeal, the City acknowledged that its "ban on the retail sale of spray paint should be reviewed under the *Pike* test." City's Seventh Circuit Brief, pp. 13-14. Not contesting the district court's factual findings or the application of the *Pike* test, the City's principal argument before the Seventh Circuit was that the district court was precluded from conducting an evidentiary hearing in balancing the impact on interstate commerce against the putative benefits of the ordinance. The City argued that "there is no place under *Pike* for fact-finding." City's Seventh Circuit Brief, p. 16.

The Seventh Circuit reversed on an entirely different ground. (App. 1, p. 1). Despite the City's concession to the contrary, the Seventh Circuit held that the *Pike* test was inapplicable, because the ordinance was not discriminatory in purpose or effect. The court divided laws affecting commerce into three categories. (App. 1, p. 11). The first category consisted of laws that explicitly dis-

criminate against interstate commerce. (App. 1, p. 11). The court stated that such facially discriminatory laws were per se unconstitutional. The second category consisted of those laws that were facially neutral but had a discriminatory effect on interstate commerce. (App. 1, pp. 11-12). According to the court, such laws were to be analyzed under the *Pike* test. The third category consisted of laws that did not discriminate against interstate commerce but nonetheless impacted interstate commerce. (App. 1, pp. 12-13). The court concluded that such laws were subject to rational-basis review rather than review under the *Pike* test. Under the Seventh Circuit's three-prong analysis, the *Pike* test was inapplicable unless the challenged law *discriminated* against interstate commerce.

The Seventh Circuit classified the sales ban as a "third category" ordinance which was not subject to review under a per se or *Pike* standard but, instead, was subject to rational-basis review. (App. 1, pp. 13-14). Relying on Equal Protection Clause precedent and analysis, the majority of the panel below determined that the district court should not have conducted an evidentiary hearing to determine if the sales ban satisfied the rational-basis test.[3] (App. 1, pp. 3-7).

---

[3] The concurrence disagreed with the majority's position that a district court was precluded or limited in conducting an evidentiary hearing. (App. 1, pp. 16-17).

REASONS FOR GRANTING THE WRIT

The decision below, along with recent decisions from the Third Circuit, alters the Commerce Clause framework enunciated by this Court and traditionally followed by the remaining circuits. For the past twenty-five years, this Court and most circuit courts of appeals have followed a two-prong approach in analyzing Commerce Clause cases. Under this approach, state laws or local ordinances that discriminate against interstate commerce, whether on their face or in their practical effect, have been held to be virtually per se illegal under the standard set forth in *Philadelphia v. New Jersey*, 437 U.S. 617 (1978). In contrast, nondiscriminatory regulations that nonetheless burden interstate commerce have been judged by the balancing test enunciated in *Pike*. Moreover, in analyzing nondiscriminatory ordinances under the *Pike* balancing test, this Court and several courts of appeals have recognized the district court's ability to conduct an evidentiary hearing.

The decision of the Seventh Circuit, however, invites a new approach to Commerce Clause jurisprudence that effectively limits the reach of the Commerce Clause. Along with recent decisions from the Third Circuit, the Seventh Circuit's decision purports to recognize a third category of Commerce Clause cases and to shift the application of *Pike* from nondiscriminatory regulations to discriminatory regulations. Ordinances that discriminate in their effect, and would hence be unconstitutional under a per se standard, could be constitutional under the less stringent *Pike* standard. Nondiscriminatory ordinances that would otherwise be unconstitutional under the *Pike* balancing test, such as the spray paint ban, would become constitutional, because the ordinances

would be analyzed under a rational-basis test. The Seventh Circuit's decision further limits the reach of the Commerce Clause by preventing the district court from conducting an evidentiary hearing when applying the *Pike* balancing test.

Certiorari is necessary to address and resolve the undeniable conflict between the decision below and the holdings of this Court and several courts of appeals. The conflict is not merely academic: millions of dollars of interstate commerce revolve around this Court's decision. Critical constitutional issues, involving millions of dollars of interstate commerce, should not turn upon the circuit in which a law is passed.

I. The Decision Below Is in Direct Conflict with Decisions of This Court and Other Courts of Appeals as to the Standard for Review in Commerce Clause Cases.

The *Pike* balancing test has long set the standard for deciding the constitutionality of evenhanded regulations that burden interstate commerce. The *Pike* test requires a court to balance the burden imposed upon such commerce against the putative local benefits of the regulation and to determine if the local benefits can be achieved by alternatives that are less burdensome on interstate commerce. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

The *Pike* test, however, has not been without its critics. Academics and other commentators have argued that the application of the test should be changed. *See* Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091 (1986); Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 Yale L.J. 425

(1982). Despite the explicit language in *Pike* stating that its test applies to statutes and ordinances that regulate evenhandedly, these commentators advocated a new approach to Commerce Clause cases under which evenhanded ordinances are reviewed under a rational-basis standard, rather than under *Pike*.[4]

The Seventh Circuit, along with the Third Circuit, has now followed these commentators and changed the *Pike* analysis. Under this new approach, Commerce Clause cases are divided into three categories, each subject to different scrutiny.[5] State and local ordinances that explicitly discriminate against interstate commerce are subject to the highest scrutiny and are virtually per se invalid. (App. 1, p. 11). Those laws that appear facially neutral but discriminate in effect against interstate commerce are to be reviewed under the *Pike* balancing test. (App. 1, pp. 11-12). The third category of laws—those that do not discriminate against interstate commerce—are subject merely to rational-basis review. (App. 1, pp. 12-13).

Thus, under the Seventh Circuit's three-prong approach, ordinances that do not discriminate against in-

---

[4] Justice Scalia has endorsed this criticism, and has argued that this Court should confine the protections of the dormant Commerce Clause to laws that discriminate against interstate commerce. *See Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 897-98 (1988) (Scalia, J., concurring); *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 95 (1987) (Scalia, J., concurring).

[5] It is important to note that the three-prong approach does not eliminate the *Pike* balancing test and its perceived difficulty of application. Instead, the three-prong approach simply transfers application of the *Pike* test to a different category of cases.

terstate commerce warrant virtually no Commerce Clause protection. Those ordinances that do discriminate against interstate commerce merit different levels of Commerce Clause protection depending on whether the discrimination appears on the ordinance's face or only in its effect.

The Third Circuit has advocated a similar analysis of Commerce Clause cases. In *Instructional Systems, Inc. v. Computer Curriculum Corp.*, 35 F.3d 813 (3rd Cir. 1994), *cert. denied, Computer Curriculum Corp. v. Instructions Systems, Inc.*, 115 S. Ct. 1176 (1995), the Third Circuit addressed whether certain applications of the New Jersey Franchise Practices Act violated the Commerce Clause. In reversing the lower court's decision, the Third Circuit held that *Pike* was not invoked unless the burden on interstate commerce was discriminatory:

> Under this Court's precedent the *only* incidental burdens on interstate commerce that implicate the Commerce Clause . . . are those that discriminate against interstate commerce. We have so held because the Commerce Clause is concerned with protectionism and the need for uniformity, and case law demonstrates that legislation will not be invalidated under the *Pike* test unless it imposes *discriminatory burdens* on interstate commerce . . . . Thus, where the burden on out-of-state interests rises no higher than those placed on competing in-state interests, it is a burden on *commerce* rather than a burden on *interstate* commerce.

Id. at 826-27 (emphasis in original) (*quoting Old Bridge Chemicals, Inc. v. New Jersey Dept. of Environmental Protection*, 965 F.2d 1287, 1295 (3rd Cir. 1992)).

In adopting the reformulation of the law suggested by the above-cited commentators, the Seventh and Third

Circuits have departed markedly from established precedent. Numerous decisions of this Court and various courts of appeals hold that there are only two categories of cases for Commerce Clause purposes. Under the two-prong approach, ordinances that discriminate in any way against interstate commerce, whether on their face or in their effect, are subject to the higher scrutiny test of *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), and are, therefore, virtually per se unconstitutional. The remaining ordinances—those that do not discriminate against but nonetheless impact interstate commerce—are reviewed under the *Pike* balancing test.

By its express terms, the *Pike* test applies to laws that regulate "evenhandedly"—in other words, laws that do *not* discriminate against interstate commerce:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it can be promoted as well with a lesser impact on interstate activities.

Id. at 142.

Since 1970, the *Pike* balancing test has served as the standard for dormant Commerce Clause jurisprudence involving challenged ordinances that do *not* discriminate against interstate commerce. For example, in *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), this Court applied the *Pike* balancing test in evaluating the constitutionality of a nondiscriminatory statute banning

the retail sale of milk in certain plastic containers. Noting that the applicable constitutional analysis depended on whether the challenged regulation was discriminatory or evenhanded in its application, this Court stated:

> Since the statute does not discriminate between interstate and intrastate commerce, the controlling question is whether the incidental burden imposed on interstate commerce by the Minnesota Act is clearly excessive in relation to the putative local benefits. *Pike v. Bruce Church, Inc.*, supra, at 142.

Id. at 472. Thus, this Court applied *Pike* to a statute that did not discriminate against interstate commerce.

In two recent decisions, this Court reaffirmed the use of a two-part standard for Commerce Clause analysis, not the type of three-part analysis employed by the Seventh and Third Circuits. In *Oregon Waste Systems, Inc. v. Department of Environmental Quality of the State of Oregon*, 114 S. Ct. 1345, 1348 (1994), this Court addressed whether Oregon's surcharge on the in-state disposal of solid waste generated in other states violated the Commerce Clause. The majority opinion outlined the two accepted classifications of ordinances challenged under the Commerce Clause:

> [T]he first step in analyzing any law subject to judicial scrutiny under the negative Commerce Clause is to determine whether it regulates evenhandedly with only incidental effects on interstate commerce, or discriminates against interstate commerce. If a restriction on commerce is discriminatory, it is virtually per se invalid. By contrast, nondiscriminatory regulations that have only incidental effects on interstate commerce are valid unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

Id. at 1350 (citations omitted).

On the heels of *Oregon Waste Systems*, this Court further expounded upon the appropriate Commerce Clause analyses in *C&A Carbone, Inc. v. Town of Clarkston, New York*, 114 S. Ct. 1677 (1994). In *C&A Carbone*, this Court addressed the constitutionality of an ordinance which required all solid waste within Clarkston, New York to be processed at a designated transfer station before leaving Clarkston. The majority held that the ordinance was discriminatory in its effect and thus per se unconstitutional. *Id.* at 1682-84. The majority succinctly outlined the two possible analyses to determine whether the Commerce Clause has been violated:

> For this inquiry our case law yields two lines of analysis: first, whether the ordinance discriminates against interstate commerce and second, whether the ordinance imposes a burden on interstate commerce that is clearly excessive in relation to the putative local benefit.

Id. at 1682 (citations omitted). Finding that the challenged ordinance was discriminatory in its practical effect and design, this Court held the ordinance unconstitutional without reaching the *Pike* test. *Id.*

Justice O'Connor concurred in the majority's conclusion but did not find the ordinance discriminatory on its face or in its effect; instead, Justice O'Connor concluded that as a non-discriminatory ordinance, the ordinance was nonetheless violative of the Commerce Clause when scrutinized under the balancing test of *Pike*. *Id.* at 1687 (O'Connor, J., concurring). Like the majority, Justice O'Connor recognized the *two* analyses utilized by this Court:

> We have generally distinguished between two types of impermissible regulations. A facially nondiscriminatory regulation supported by a legitimate state in-

> terest which incidentally burdens interstate commerce is constitutional unless the burden on interstate trade is clearly excessive in relation to the local benefits. When, however, a regulation "affirmatively" or "clearly" discriminates against interstate commerce on its face or in practical effect, it violates the Constitution unless the discrimination is demonstrably justified by a valid factor unrelated to protectionism.

Id. at 1688 (O'Connor, J., concurring) (citations omitted). In emphasizing that the absence of a discriminatory intent or effect does *not* end Commerce Clause analysis, Justice O'Connor stated:

> That the ordinance does not discriminate against interstate commerce does not, however, end the Commerce Clause inquiry. Even a nondiscriminatory regulation may nonetheless impose an excessive burden on interstate trade when considered in relation to the local benefits conferred. Indeed, we have long recognized that the burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to . . . the people of the State enacting such statute.

Id. at 1689 (O'Connor, J., concurring) (citations omitted). Thus, in two cases decided in 1994, this Court explained that the *Pike* balancing test applies when the challenged ordinance does *not* discriminate against interstate commerce.

Not only do the Seventh and Third Circuit cases conflict with decisions of this Court, but they also are contrary to holdings of other courts of appeals. Like this Court, these other courts of appeals have determined that a per se test is used when an ordinance discriminates on its face or in its effect and the *Pike* balancing test is used when discrimination is absent: *Fireside Nis-*

san, Inc. v. Fanning, 30 F.3d 206, 214 (1st Cir. 1994) (in the absence of a purpose or effect of discrimination, a law will be analyzed under a balancing test); *New York State Trawlers Ass'n v. Jorling*, 16 F.3d 1303, 1307-08 (2d Cir. 1994) (a statute that regulates evenhandedly must be analyzed under *Pike*); *Medigen of Kentucky, Inc. v. Public Service Commission of West Virginia*, 985 F.2d 164, 166 (4th Cir. 1993) (*Pike* test applicable when challenged ordinance does not discriminate); *Cooper v. McBeath*, 11 F.3d 547, 553 (5th Cir.), *cert. denied*, 114 S. Ct. 2675 (1994) (a statute that regulates evenhandedly is assessed under the *Pike* balancing test); *SDDS, Inc. v. State of South Dakota*, 47 F.3d 263, 267-68 (8th Cir. 1995) (*Pike* applicable when challenged law does not discriminate against interstate commerce on its face or in its effect); *Barber v. State of Hawaii*, 42 F.3d 1185, 1194 (9th Cir. 1994) (two-tier approach to Commerce Clause cases invokes the *Pike* test when challenged regulation does not discriminate against interstate commerce); *Blue Circle Cement, Inc. v. Board of County Commissioners of the County of Rogers*, 27 F.3d 1499, 1512 (10th Cir. 1994) (*Pike* test applies specifically when the challenged ordinance does not discriminate facially or in effect); *Diamond Waste, Inc. v. Monroe County, Ga.*, 939 F.2d 941, 944-945 (11th Cir. 1991) (*Pike* test applies when ordinance does not discriminate).

The conflict between the above-cited cases and the type of analysis adopted by the Seventh and Third Circuits was acknowledged by the district court in *Sherwin-Williams Co. v. City and County of San Francisco*, 857 F. Supp. 1355 (N.D. Cal. 1994). In *Sherwin-Williams*, San Francisco enacted a lock-up ordinance in 1993 requiring retail sellers of spray paint and markers to store those items in an area that was not accessible to customers

without employee assistance. The lock-up ordinance was challenged as a violation of the Commerce Clause. After a four-day trial, the district court found that the lock-up ordinance was constitutional. *Id.* at 1358.

The ultimate result, however, was a product of the district court's application of the *Pike* balancing test. Noting that the lock-up ordinance applied evenhandedly but nonetheless posed incidental burdens on interstate commerce, the district court relied upon the *Pike* test to determine whether the ordinance's burdens on interstate commerce were clearly excessive in relation to the putative local benefits. *Id.* at 1365-66. In invoking *Pike*, the district court expressly rejected an argument that mirrors the decision of the Seventh Circuit that nondiscriminatory regulations are essentially outside of Commerce Clause protection:

> Some recent case law suggests that a court's commerce clause analysis should end once it concludes that the challenged legislation impacts intrastate and interstate commerce identically and the particular means chosen to achieve the legislation's goals are not wholly arbitrary. The greater weight of legal authority, however, dictates further analysis by this Court to ascertain whether the burden the Ordinance imposes on interstate commerce is clearly excessive in relation to the putative local benefits.

Id. at 1366.

Petitioners believe that the Seventh and Third Circuits' new approach to Commerce Clause cases is plainly inconsistent with the unambiguous and historical role of the *Pike* test in evaluating nondiscriminatory regulations. However, regardless of whether the petitioners are correct concerning the proper application of the *Pike* test, the petitioners respectfully suggest that this Court, and

not the Seventh or Third Circuit, is responsible for bringing about a significant change in Commerce Clause jurisprudence that has very real and far-reaching effects.

In this case alone, millions of dollars of interstate commerce rest on a decision by this Court. As adduced at trial, the ban on spray paint sales in Chicago will result in millions of dollars of lost interstate commerce. Moreover, the entire spray paint industry would be decimated if states and large municipalities enact similar sales bans, a very real possibility. Beyond spray paint, the list of everyday household or personal products that are capable of misuse and thus subject to a sales ban are limited only by one's imagination. Given the clear and uncontested factual record and the significant ramifications arising from the sales ban, this case presents a perfect vehicle for this Court to clarify critical constitutional issues and to resolve the undeniable conflict surrounding those issues.

II. The Decision Below Is in Direct Conflict with Decisions of This Court and Other Courts of Appeals as to Whether the District Court Can Conduct an Evidentiary Hearing under Pike.

Having adopted a three-prong approach to Commerce Clause analysis, the majority below also departed from numerous decisions of this Court and several courts of appeals in concluding that the district court is precluded, except in rare instances, from conducting an evidentiary hearing when weighing the burden imposed on interstate commerce versus the putative benefits of the ordinance. In contrast, the concurrence argued that once *Pike* was invoked, an evidentiary hearing was not only appropriate but possibly mandatory:

> And once that test [*Pike*] has been activated, it seems to me that the questions it poses may only be answered by some form of evidentiary hearing.

(App. 1, pp. 16-17). The concurrence went on to note that this Court has consistently authorized judicial fact-finding under *Pike*. (App. 1, p. 17).

The concurrence's observation concerning this Court's precedent is well-supported. For example, in *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978), the state of Wisconsin enacted nondiscriminatory regulations generally precluding the operation of trucks longer than 55 feet on Wisconsin highways. *Id.* at 432. The regulations were challenged by several interstate trucking firms as an unconstitutional burden on interstate commerce. *Id.* at 435. A three-judge panel of the district court conducted a trial at which Wisconsin asserted that its regulations to preclude longer trucks were justified for safety reasons. *Id.* at 436. In contrast, the trucking companies presented considerable (and uncontroverted) evidence that trucks longer than 55 feet were as safe as trucks 55 feet or shorter. *Id.* at 436. The trucking companies also presented uncontroverted evidence that their operations were disrupted, their costs increased, and their service slowed by Wisconsin's regulations. *Id.* at 438. After considering the evidence, the district court, in a decision that is consistent with the decision below, refused to find the regulations unconstitutional, because the length of trucks had some relation to safety and the detriments to the trucking companies were inconsequential. *Id.* at 439.

In reversing the three-judge district court and holding the regulations unconstitutional, this Court focused on the factual record that demonstrated that the regulations would not achieve their purported safety objectives:

> Despite the strength of this presumption [deference to legislature], we are persuaded by the record in this case that the challenged regulations unconstitutionally burden interstate commerce. As we have shown, appellants produced a massive array of evidence to disprove the State's assertion that the regulations make some contribution to highway safety. The State, for its part, virtually defaulted in its defense of the regulations as a safety measure.

Id. at 444.

In closing, this Court noted: "Commerce Clause adjudication must depend in large part upon the thoroughness with which the lawyers perform their task in the conduct of constitutional litigation. Here, as in many other fields, *constitutionality is conditioned upon the facts*, and to the lawyers the courts are entitled to look for garnering and presenting the facts. *Id.* at 447-48 n.25 (emphasis added) (*citing* Dowling, *Interstate Commerce and State Power*, 27 Va. L. Rev. 1, 27-28 (1940)).

This Court reached a similar result in *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981), where it affirmed the district court's finding after a 14-day trial that Iowa's nondiscriminatory regulations generally prohibiting the use of trucks beyond 55 feet were unconstitutional. Having held that the *Pike* balancing test was applicable, the plurality examined the extensive evidence relied upon by the district court and agreed with the district court that the trucking companies' evidence far outweighed the extensive, but unpersuasive, evidence presented by Iowa. *Id.* at 671-678.

In *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), this Court similarly relied upon factual evidence in applying the *Pike* balancing test to a Minnesota regulation that prohibited the use of certain plastic milk

cartons. In particular, this Court specifically cited the trial testimony of the chairman of one of the dairies that challenged the regulation indicating that the dairy would not be impeded in selling milk in or out of Minnesota. *Id.* at 472 n.16. Although application of the *Pike* test resulted in a different ultimate conclusion than in *Raymond* or *Kassel*, the ability of the trial court to conduct an evidentiary hearing when applying the *Pike* test was not limited.

More recently, the Tenth Circuit came to a similar conclusion in *Blue Circle Cement, Inc. v. Board of County Commissioners of the County of Rogers*, 27 F.3d 1499 (10th Cir. 1994). In that case, Rogers County, Oklahoma enacted an ordinance that effectively banned the use of Hazardous Waste Fuels ("HWFs") in the county. Blue Circle Cement desired to use HWFs at its Rogers County quarry and cement plant and challenged the ordinance barring the use of HWFs as a violation of the Commerce Clause. *Id.* at 1501-1502. On the eve of a scheduled trial, the district court granted summary judgment to Rogers County. *Id.* at 1502. The district court ruled that the ordinance was "devoid of economic animus toward out-of-state interests" and thus did not violate the Commerce Clause. *Id.* at 1510.

On appeal, the Tenth Circuit reversed, holding that summary judgment was inappropriate. After noting that the mere incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack, the Tenth Circuit held that the constitutional issues merited an evidentiary hearing:

> Here, there is no evidence that the HWFs that Blue Circle proposes to burn or the byproduct of combustion of such HWFs, would present any significant

> health or safety hazard. There is no evidence that the Ordinance's requirements are related in any reasonable way to any hazard that the HWFs might present. And, there is no evidence whether the county's local interest could be promoted as well in other ways with a lesser impact on interstate activity. Blue Circle represents, and the board does not refute, that it presented evidence that the ordinance's site requirements are excessive in relation to the putative local benefits. Not only did the Court apparently fail to consider this evidence, but it also did not address the other factors in the *Pike* balancing test.

Id. at 1512.

The district court in the *Sherwin-Williams* case, discussed previously, came to the same conclusion. 857 F. Supp. 1355 (N.D. Cal. 1994). In applying the *Pike* test, the district court conducted an evidentiary hearing and relied upon voluminous written testimony submitted by the parties. *Id.* at 1358. Thus, the *Sherwin-Williams* court and the district court in the present case both received factual evidence in reviewing the respective ordinances under the *Pike* test.[6]

Thus, this Court and several lower courts have recognized that a district court can and should conduct an evidentiary hearing when applying the *Pike* balancing test. The decision of the Seventh Circuit, however, does not agree with this premise. This conflict, so aptly empha-

---

[6] In noting the discrepancy between its decision and the district court's decision in this case, the district court in *Sherwin-Williams* expressly noted that the facts presented in each case differed significantly. *Id.* at 1370 n.18. In particular, the district court stressed that the burdens imposed on interstate commerce by Chicago's ban on the retail sale of spray paint were considerably more significant than the burdens imposed by San Francisco's lock-up ordinance. *Id.* at 1370 n.18.

sized in the concurring opinion in this case, demands resolution from this Court. Although this case alone involves millions of dollars of lost interstate commerce, almost any household product could face legislative extinction because of misuse or abuse. The implications of this case, therefore, are sweeping.

CONCLUSION

For the foregoing reasons, the petitioners respectfully request that this Court grant certiorari.

Respectfully submitted,

STEVEN P. HANDLER
Counsel of Record
BRUCE H. WEITZMAN
DANIEL J. DONNELLY
McDERMOTT, WILL & EMERY
227 West Monroe Street
Chicago, Illinois 60606
(312) 372-2000

Attorneys for
All Petitioners except
The Sherwin-Williams Company

Of Counsel:

HEIDI K. McAULIFFE
NATIONAL PAINT & COATINGS ASSOCIATION
1500 Rhode Island Avenue, N.W.
Washington, D.C. 20005
(202) 462-6272

THOMAS G. DENT
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
55 East Monroe Street
Chicago, Illinois 60603
(312) 346-8000

Attorneys for
The Sherwin-Williams Company